No. 2798.

United States

Circuit Court of Appeals

NINTH CIRCUIT.

T. F. Turner,
Appellant,

vs.

Kate J. Wells and Ironsides Mining, Reduction and Leasing Company, a corporation,
Appellees.

BRIEF OF APPELLEES.

Appeal from the United States District Court for the Southern District of California, Northern Division.

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A. W. Wells, who signed the writing upon which the appellant relies, was the husband of Kate J. Wells, appellee and principal defendant, the other appellee being her lessee. They intermarried on April 20, 1900, and the relation continued until his death in September, 1914. When the writing was first offered in evidence it was objected to by appellee on divers grounds, but was admitted by the court "solely for the purpose of showing the existence of the grubstake contract." [Tr. p. 53.]

Later, the writing was again offered "for all purposes" and was again objected to on the following grounds:

1. That it was not admissible against the wife of A. W. Wells without her consent.

2. That it was not admissible as the declaration of a conspirator, no conspiracy having been shown.

3. That assuming that a conspiracy had been shown, it was a declaration made long after the object of the conspiracy had been accomplished, and was merely a narrative or history of a past event and not admissible against a co-conspirator.

The court sustained the objection on the third ground. [Tr. pp. 62, 63.]

The court prefaced the decision of the cause a day or two later by stating that he had concluded to admit the writing for all purposes. [Tr. p. 76.]

This statement of A. W. Wells was not competent evidence for any purpose.

Subdivision 1 of section 1881, Code of Civil Procedure of California, reads as follows:

> "1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceedings by one against the other, nor to a criminal action or proceedings for a crime committed by one against

> the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery committed by either husband or wife."

It is too clear for argument that had A. W. Wells been alive at the time of the trial, he would not have been competent to testify in this cause without the consent of appellee, Kate J. Wells.

> "The declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses."
>
> 1 Greenleaf on Evidence (16 Ed.), Sec. 341;
>
> Dawson v. Hall, 2 Mich. 390, 395;
>
> State v. Burlingame, 146 Mo. 207, 225.

In Gardner v. Klutts, 8 Jones' Law, 375, 80 Am. Dec. 331, the Supreme Court of North Carolina disposes of this question in this way:

> "A wife is not a competent witness for or against her husband. * * * It follows that her declarations cannot be evidence for or against him; otherwise more weight is given to what she says when not on oath, than to what she would say on oath, which is absurd."

And the Supreme Court of Indiana, as follows:

> "If a husband cannot testify against his wife as a witness, much stronger are the reasons why his statements without oath should not be received against her."
>
> Kingen v. State, 50 Ind. 557.

"It would seem to follow, as a necessary conclusion, from the incompetency of the wife to testify for her husband under the sanctions of an oath, that her unsworn declarations could not be proved by a third party and in that way made evidence."

Karney v. Paisley, 13 Iowa 89, 92.

To the same effect are

Kinnemer v. State, 66 Ark. 206;

Tackett v. May, 3 Dana 79;

Dubois v. Ferrand, 8 La. Ann. 373.

That this written statement of A. W. Wells was not admissible as the declaration of a conspirator is equally well settled. No conspiracy was shown and if there had been it was but a narrative of past events and not a declaration in furtherance of a conspiracy while the same was in progress of accomplishment.

"The court went too far in admitting testimony on the general question of conspiracy.

"Doubtless in all cases of conspiracy the act of one conspirator in the prosecution of the enterprise is considered the act of all and is evidence against all. * * * But only those acts and declarations are admissible under this rule which are done and made while the conspiracy is pending and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admission of one conspirator by way of narrative of past facts are not admissible in evidence against the others."

Logan v. United States, 144 U. S. 263.

In view of the foregoing, it is respectfully submitted that in disposing of this appeal the written statement of A. W. Wells should be wholly eliminated from consideration as a part of the evidence.

There is substantial conflict in the evidence. See testimony of Kate J. Wells [Tr. p. 63 *et seq.*] to the effect that B. T. Robinson, her son, and she had been in this district a number of times prior to 1907; that they knew the ground and that her son, the locator of these claims, was there in 1907 under an agreement with her, she furnishing the supplies.

The decree of the court below dismissing the bill was, of necessity, an implied finding of the facts against the appellant. While such finding is not conclusive on this court, nevertheless, where "the record discloses a serious conflict of testimony and the court below might well have dismissed the bill solely for failure to establish the facts upon which the claim for relief is based, a decree of dismissal will be affirmed."

Hewitt v. Campbell, 109 U. S. 103 (syllabus).

Respectfully submitted,

S. E. Vermilyea,

S. L. Carpenter,

Solicitors for Appellees, Kate J. Wells and Ironsides Mining, Reduction and Leasing Company.